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APPENDIX

Supreme Court of the United States

Octobter Term, 1973

No. 72-1597

ULYSSES VERNON BEASLEY,
EMIDIO J. BASSETTI AND
JOE W. JONES,

Petitioners,

v.

FOOD FAIR OF NORTH CAROLINA, INC.
AND RAY F. MESSICK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED MAY 29, 1973
CERTIORARI GRANTED OCTOBER 15, 1973

Supreme Court of the United States

October Term, 1973

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INDEX

Complaint 1
Motion to Dismiss, Motion for Judgment on the Pleadings, and Plea in Abatement Filed December 14, 1971 4
Affidavit–Ray F. Messick, February 23, 1972 8
Decision of National Labor Relations Board, June 3, 1971 9
Order and Judgment, February 28, 1972 13
Appeal Entries, February 28, 1972 15
Assignment of Error 15
North Carolina Right-To-Work Law 16
Labor-Management Relations Act (Selected Sections) 18
Letter to Larry L. Eubanks from Director, Office of Appeals, National Labor Relations Board 13
Opinion of North Carolina Court of Appeals, August 2, 1972 20
Opinion of North Carolina Supreme Court 30

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 71-CUS-5060

STATE OF NORTH CAROLINA :
COUNTY OF FORSYTH :

ULYSSES VERNON BEASLEY, :
EMIDIO J. BASSETTI, AND :
JOE W. JONES, :
Plaintiffs, :
v. : **No. 72-1597**

FOOD FAIR OF NORTH CAROLINA, :
INC., AND RAY F. MESSICK, :
Defendants. :

COMPLAINT

COMES NOW the Plaintiffs, and complaining of the Defendants, says and alleges:

I.

That the Plaintiffs are residents of the State of North Carolina and were residents of this State at all times material herein.

II.

That Defendant Food Fair of N.C., Inc., is a North Carolina corporation operating at all times material herein a number of grocery stores in Forsyth County, North Carolina.

III.

That Defendant Ray F. Messick is a resident of Winston-Salem, North Carolina and is an officer and director of the above-mentioned corporate defendant.

IV.

That each of the Plaintiffs were employed by the Defendant Food Fair for at least 10 years prior to June 25, 1971 in its Winston-Salem, North Carolina Stores, and at all times material herein, had contracts of employment with said Defendant whereby Plaintiffs were to serve Defendants as meat market managers for a weekly wage.

V.

That in April, 1971, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, instituted an organizing campaign among Defendant Food Fair's meat department employees, and following a National Labor Relations Board election on June 24, 1971, said labor organization was certified as collective-bargaining representative for all of said Defendants' meat market employees.

VI.

That Plaintiffs joined said labor organization in April and May, 1971 and that Defendants Food Fair and Messick had knowledge of this prior to June 24, 1971.

VII.

That on June 25 and 27, 1971, Defendant Messick, acting individually and as agent for Defendant Food Fair of N.C., Inc., discharged the Plaintiffs because of their membership in said labor organization, all in violation of the

laws and General Statutues of the State of North Carolina.

VIII.

That as a direct and proximate result of the Defendants' conduct, Plaintiffs have been embarrassed and humiliated in their community, have lost all means of income for the support of themselves and their families, have been unable to find other employment, and have been otherwise permanently damaged in the amount of $500,000.00.

IX.

That the conduct complained of was willful, reckless, malicious, and without the slightest regard for the rights guaranteed the Plaintiffs by the General Statutues of North Carolina, and therefore, Plaintiffs are entitled to punitive and smart money damages in the amount of $1,000,000.00.

WHEREFORE, Plaintiffs pray for the following relief:

(a) That they have and recover of the Defendants the sum of $300,000.00 actual damages.

(b) That they have and recover of the Defendants the sum of $1,000,000.00 in punitive damages.

(c) That Defendants be taxed with the costs of this action; and

(d) For such other and further relief as to the Court seems just and proper.

EUBANKS AND SPARROW

By /s/ LARRY L. EUBANKS
Larry L. Eubanks
Attorney for Plaintiffs
417 NCNB Building
Winston-Salem, North Carolina
27101
Telephone: (919) 723-0741

* * * * *

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
71-CVS-5060

NORTH CAROLINA
FORSYTH COUNTY

[Caption omitted in printing]

MOTION TO DISMISS, MOTION FOR JUDGMENT ON THE PLEADINGS, and PLEA IN ABATEMENT

NOW COMES the defendant Food Fair of N.C., Inc., pursuant to Rule 12 of the North Carolina Rules of Civil Procedure, and respectfully moves the Court as follows:

I. *To dismiss the action* for failure to state a claim upon which relief can be granted by this Cout, and for want of jurisdiction over the subject matter. In support of this Motion, the defendant respectfully shows the Court:

(a) The National Labor Relations Board has exclusive jurisdiction over the subject matter of this action.

(b) On June 28, 1971, plaintiffs filed a charge with the National Labor Relations Board alleging unfair labor practice in violation of Section 7 and Section 8(a)(1) and (3)

of the Labor Management Relations Act (29 U.S.C. 7, 151 *et seq.*), *N.L.R.B. 11-CA-4622*, a copy of which is attached hereto as Exhibit 1 to this Motion and incorporated herein as if fully set forth in this paragraph.

(c) The same subject matter is alleged in the Complaint in the present action.

(d) The National Labor Relations Board is empowered to award a remedy not less than that authorized by North Carolina General Statute 95-83.

(e) This charge is pending before the National Labor Relations Board which has exclusive jurisdiction over unfair labor practices brought before it. (See *Douglas Aircraft v. Local Union 379*, IBEW 247 N.C. 620; 101 S.E.2d 800, at page 806).

(f) The aforesaid charges brought before the National Labor Relations Board are still pending by virtue of an appeal taken by the present plaintiffs from a decision of the Regional Director, a copy of which appeal is attached hereto as Exhibit 2 and incorporated herein as if fully set forth in this paragraph.

II. *To dismiss the action* on the ground that the plaintiffs have already been adjudicated not to be employees by the National Labor Relations Board, and, therefore, do not come within the purview of North Carolina General Statute 95-78 *et seq.*, upon which the present action is based. In support of said Motion, the defendants respectfully show the Court:

(a) Plaintiffs were adjudicated to be supervisors within the meaning of the Labor Relations Act (29 U.S.C. 7, Sections 2(3) and 2(11), by the National Labor Relations Board by Order dated June 3, 1971, a copy of which Order is attached hereto as Exhibit 3 and incorporated herein as if fully set forth; and as supervisors, they are management personnel and not subject to the provisions of General Statute 95-78 *et seq.*

III. *By way of Plea in Abatement,* the defendants respectfully show the Court:

(a) The aforesaid charges pending before the National Labor Relations Board were instituted prior to the present action, and involved the same parties and subject matter of the present action. The defendants respectfully submit that the plaintiffs are not entitled to maintain the present action by virtue of the aforesaid prior action, which is still pending.

IV. *To dismiss the action* for misjoinder of claims and for failure to state claim upon which relief can be granted, and in support of said Motion, defendant respectfully shows the Court:

(a) The Complaint alleges violations as to all four plaintiffs, but alleges damages collectively, and does not define or allege what damages were suffered by each plaintiff individually, making it impossible for defendant to defend against the claims of the individual plaintiffs.

V. *In the alternative,* the defendant moves to dismiss and for judgment on the pleadings as to Paragraph IX of the Complaint and subparagraph (b) of the prayer for relief pertaining to punitive damages, on the ground that such

punitive damages are not recoverable in this action as a matter of law. See G.S. 95-83.

WHEREFORE, the defendant Food Fair of N.C., Inc., respectfully prays the Court that the plaintiffs' motion be dismissed; and, in the alternative, if the entire Motion is not allowed, that that portion of the Complaint seeking to recover punitive damages be stricken and eliminated.

This the 14th day of December, 1971.

MOSS, GRIGSBY and MARSHALL
By /s/ ROBERT G. MOSS
Robert G. Moss

HUDSON, PETRIE, STOCKTON,
STOCKTON & ROBINSON
By /s/ R.M. STOCKTON, JR.
R.M. Stockton, Jr.
Attorneys for Defendants

[Certificate of service omitted in printing]

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
71-CVS-5060

NORTH CAROLINA :
FORSYTH COUNTY :

[Caption omitted in printing]

AFFIDAVIT

RAY F. MESSICK, being duly sworn, deposes and says:

I am President of Food Fair of N.C., Inc., one of the defendants in this action. I am the President and chief operating officer of this defendant corporation.

Each of the plaintiffs in this action was at the time alledged a manager of the meat market of one of the stores owned and operated by the defendant, Food Fair of N.C., Inc. There is a meat market at each of the corporate defendant stores and the plaintiffs, as meat market managers at their respective stores, were not responsible to either the store manager or the assistant manager. The meat markets were operated independently and each of the plaintiffs had full supervisory authority ever said meat market and the employees in the meat market. Each of the plaintiffs was supervisor of his respective meat market and its employees and had authority to hire, fire or discipline meat market employees, responsibility for directing them and adjusting their grievances by the use of their independent judgment.

The plaintiffs, as meat market managers, independently and on their own authority scheduled regular hours and overtime hours for meat market employees. Each of the plaintiffs, as meat market managers, exercised their authority to grant time off and to tell meat market employees what to do in their employment in the meat market. Each of the plaintiffs were paid more than other employees, were provided more life insurance by the defendant corporation, get more sick leave and a larger Christmas bonus, as well as a year-end bonus, which the other meat market employees did not receive.

On June 3, 1971, the Regional Director of the Eleventh Region of the National Labor Relations Board issued an order adjudicating Ulysses Vernon Beasley, Emidio J. Bassetti and Joe W. Jones, plaintiffs in this case, as supervisors. This order also included all other meat managers of the defendant corporation.

There is attached to this affidavit a true copy of the decision of the NLRB.

/s/ RAY F. MESSICK
Ray F. Messick

Sworn to and subscribed before me, this 23rd day of February, 1972.

/s/ FRANCES L. ADAMS
Frances L. Adams
Notary Public

My commission expires: August 13, 1975.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FOOD FAIR of N.C., INC.[1]
Employer,

and

No. 11-RC-3330

LOCAL 525, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner.

[1] The name of the Employer appears as amended at the hearing.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:[2]

---

[2] The Employer is a North Carolina corporation with eleven retail stores in Forsyth County, N.C. There are 34 employees in the unit herein found appropriate. The Petitioner seeks a unit of all meat department employees at all the stores including meat market managers. The Employer agrees with this unit except it would exclude the meat market managers as supervisors.

(continued)

All meat department employees at the Employer's stores in Forsyth County, N.C., excluding meat market managers, store managers, assistant store managers, grocery employees, produce employees, warehousemen, cashiers, office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid-off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who

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[2] (continued) There is a meat market at each of the Employer's stores with the smallest market having two employees and with the largest having eight employees. The meat managers at each of the stores are not responsible to either the store manager or assistant store manager. Neither the store manager nor assistant store manager have anything to do with the meat market at their stores. The meat market managers are under the supervision of a supervisor who travels from store to store. It is clear from the record that the meat market managers independently and on their own authority schedule both the regular hours and the overtime hours of work of the other employees in their market. Additionally the meat market managers exercise the authority to grant time off and to tell employees what work to do. They make more than the other employees, get more

(continued)

have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by Local 525, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

/s/ REED JOHNSTON

(SEAL) Dated June 3, 1971
at Winston-Salem, N.C.

Regional Director, Region 11

December 30, 1971

Larry L. Eubanks, Esq.
417 North Carolina Nat'l. Bank Bldg.
Winston-Salem, North Carolina 27101

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[2] (continued) life insurance, get more sick leave, get a greater Christmas bonus and get a year end bonus which the rank and file employees do not receive. The general policy is that the supervisor who travels from store to store hires and fires meat employees, but the managers have also exercised this authority on their own. They have also made effective recommendations to the traveling supervisor concerning the hiring and firing of employees. The record shows that at least one meat manager has effected a raise for an employee on his own authority.

Re: Food Fair of North Carolina, Inc.,
11-CA-4622

Dear Mr. Eubanks:

Your appeal in the above matter has been duly considered.

The appeal is denied. The four alleged discriminateees involved herein were supervisors within the meaning of Section 2(11) of the Act and hence were not entitled, in the circumstances herein, to the protection of the Act.

Very truly yours,
Peter G. Nash
General Counsel

By: /s/ IRVING HERMAN
Director, Office of Appeals

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
71-CVS-5060

NORTH CAROLINA :
FORSYTH COUNTY :

[Caption omitted in printing]

* * * * *

ORDER AND JUDGMENT

THIS CAUSE having been calendared for hearing on the Motion Docket at the February 21, 1972, week of Civil Court in and for Forsyth County, and having come on for hearing before the undersigned Judge of the Superior Court upon the defendants' Motion To Dismiss, Motion

for Judgment On The Pleadings, and Plea In Abatement, and all parties having been represented by counsel at said hearing before the undersigned Judge and having filed briefs and presented arguments for their respective clients and positions in the matter;

And the Court having considered the Motion To Dismiss, Motion For Judgement On The Pleadings, and Plea In Abatement; and the parties having stipulated that each of the plaintiffs in this cause was at all times complained of a supervisor of Food Fair of N.C., Inc.; and the defendants having further filed Affidavit of Ray F. Messick, dated February 23, 1972, without objection; and the Court having further considered the Motions filed as a Motion For Summary Judgment as provided under Rule 12(c) and Rule 56;

And the Court, having heard the matter and the arguments of counsel for all parties in the same, being of the opinion that the defendants' Motion For Judgment On The Pleadings and To Dismiss should be allowed for that the plaintiffs have failed to state a claim upon which relief can be granted; and the Court being further of the opinion that the defendants are entitled to summary judgment in their favor pursuant to Rule 56 in that the pleadings, stipulation and affidavits show that there is no genuine issue as to any material fact and that the defendants are so entitled to judgment as a matter of law; and the parties having agreed that the Judgment be presented on this date;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the defendants' Motion for Judgment On The Pleadings and To Dismiss is hereby allowed; that the Court has further considered said Motion as a Motion For Summary Judgment and that the defendants' Motion

For Summary Judgment is hereby allowed; that this action be and the same is hereby dismissed with prejudice; and that the costs of the action be taxed against the plaintiffs.

This the 28th day of February, 1972.

/s/ ROBERT M. GAMBILL
Robert M. Gambill
Judge Presiding

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
71-CVS-5060

NORTH CAROLINA :
FORSYTH COUNTY :

[Caption omitted in printing]

* * * * *

APPEAL ENTRIES

To the entry of the foregoing Judgment dated February 28, 1972, and for errors assigned and to be assigned, defendant in apt time objects, excepts and gives Notice of Appeal in Open Court. Further notice is waived. Appeal bond in the sum of $100.00 is adjudged sufficient. Plaintiff is hereby allowed 30 days to serve statement of case on appeal upon defendant; and defendant is hereby allowed 20 days thereafter to serve a countercase or exception.

This the 28th day of February, 1972.

/s/ ROBERT M. GAMBILL
Robert M. Gambill
Judge Presiding

ASSIGNMENT OF ERROR

The Trial Judge erred in dismissing plaintiffs action because they have been discharged from employment because of Membership in a labor organization and therefore are entitled to the protection of North Carolina General Statutes 95-78 *et seq.*

This is plaintiffs sole assignment of error which is their exception located at R.p. _____.

W. Warren Sparrow,
Attorney for Plaintiffs

OF COUNSEL:

EUBANKS AND SPARROW
417 NCNB Building
Winston-Salem, North Carolina 27101
(919) 723-0741

NORTH CAROLINA RIGHT-TO-WORK LAW

N.C.G.S. Section 95-78. Declaration of public policy. – The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association.

Section 95-79. Certain agreements declared illegal. – Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.

Section 95-80. Membership in labor organization as condition of employment prohibited. – No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

Section 95-81. Nonmembership as condition of employment prohibited. – No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

Section 95-82. Payment of dues as condition of employment prohibited. – No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees, or other charges of any kind to any labor union or labor organization.

Section 95-83. Recovery of damages by persons denied employment. – Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 95-80, 95-81, and 95-82 or of one or more of such sections, shall be entitled to recover from

such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment.

Section 95-84. Application of article. – The provisions of this article shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract.

LABOR-MANAGEMENT RELATIONS ACT
(Selected Sections)

29 U.S.C. Section 152:

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by

an employer subject to the Railway Labor Act [45 Sections 151-162, 181-188], as amended from time to time, or by any other person who is not an employer as herein defined.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. Section 164:

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act [Sections 151-158, 159-168 of this title] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective-bargaining.

Copies of the letter were received by Ray F. Messick, President of Food Fair of N.C., Inc., Robert C. Moss, Esq., his attorney, and others.

No. 7221SC457 TWENTY-FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

Spring Session 1972

* * * * *

From Forsyth

[Caption omitted in printing]

Appeal by plaintiffs Beasley, Bassetti and Jones from Gambill, Judge, 28 February 1972 Session, Superior Court, Forsyth County.

Plaintiffs jointly brought an action asking for $500,000 actual damages and $1,000,000 punitive damages, without separation of damages as to each plaintiff. They alleged that they were employed by defendant Food Fair as meat market managers. After a campaign and election, Local 525 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, was, on 24 June 1971, certified as collective-bargaining representative for all of defendant Food Fair's meat market employees. Plaintiffs joined this labor organization in April and May 1971, and defendants had knowledge of this prior to 24 June 1971. On 25 and 27 June 1971, defendant Messick, acting individually and as agent for defendant Food Fair, discharged plaintiffs because of their membership in the union. As a result of this, plaintiffs suffered embarrassment and humiliation in their community, lost all means of income, and have been unable to find other employment. The

plaintiffs further alleged that the conduct was "willful, reckless, malicious, and without the slightest regard for the rights guaranteed the Plaintiffs by the General Statutes of North Carolina."

Defendants filed motion to dismiss and plea in abatement. Grounds for motion to dismiss were that the complaint failed to state a claim upon which relief could be granted because the court lacked jurisdiction and because the complaint alleges violations as to all four plaintiffs but alleges damages collectively and fails to define or allege that damages were suffered by each plaintiff. By way of plea in abatement defendants alleged that a prior action involving the same parties and same subject matter was pending before the National Labor Relations Board. In the alternative, defendants moved to dismiss as to punitive damages on the ground punitive damages are not recoverable in this action as a matter of law. The court considered the motions to dismiss and for judgment on the pleadings as a motion for summary judgment and allowed it, dismissing the action with prejudice. Plaintiffs Beasley, Bassetti, and Jones appealed.

Eubanks and Sparrow, by Larry L. Eubanks, for plaintiff appellants.

McCaul, Grigsby and Pearsall, by Robert C. Moss, and Hudson, Petree, Stockton, Stockton and Robinson, by R. M. Stockton, Jr. and James H. Kelly, Jr., for defendant appellees.

MORRIS, Judge. It appears from the affidavit and copy of the National Labor Relations Board's order filed with

defendants' motion that the plaintiffs, who are meat market managers, are classified as supervisors under the definition contained in the Labor Management Relations Act. This is conceded by plaintiffs. It also appears by stipulation that plaintiffs' appeal to the General Counsel of the National Labor Relations Board from a denial of their claim under the Act was denied. The pertinent portions of the letter of denial follow: "Your appeal in the above matter has been duly considered. The appeal is denied. The four alleged discriminatees involved herein were supervisors within the meaning of Section 2(11) of the Act and hence were not entitled, in the circumstances herein, to the protection of the Act."

Statutes dealing with labor organizations are contained in Article 10 of Chapter 95 of the General Statutes, and became effective 18 March 1947. Section 95-78 declares the policy:

> "The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association."

G.S. 95-83 provides:

> "Any person who may be denied employment or be deprived of continuation of his employment in violation of §§95-80, 95-81 and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by

> appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment."

Plaintiffs contend that defendants have violated Section 95-81:

> "No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."

Defendants, however, contend that plaintiffs are supervisors, a fact which is conceded by plaintiffs, and that under the provisions of the Labor Management Relations Act they are specifically excluded as employees entitled to protection of the Act; that the National Labor Relations Board took jurisdiction, and denied their claim because they are not afforded the protection of the Act; and that the Taft-Hartley Act, under its provisions, has excluded and preempted State jurisdiction.

This is a case of first impression in this State. Counsel have cited no authority directly in point, nor have we found any case on "all fours". Determination requires that we first consider certain sections of the Taft-Hartley Act (Labor Management Relations Act) hereinafter referred to as the Act. Reference to section numbers shall be to those adopted in United States Code Annotated, Title 29, unless otherwise indicated. Definitions are found in Section 152. Those pertinent to this appeal are:

> "(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall

include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include . . . any individual employed as a supervisor. . . ."

"(8) The term 'unfair labor practice' means any unfair labor practice listed in Section 158 of this title."

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 157 gives to "employees" the right "to form, join, or assist labor organizations". Section 158(a) sets out certain actions which shall be deemed unfair labor practices on the part of an employer. Among those are (1) interference with rights guaranteed to employees in Section 157 and (3) discrimination with respect to hiring or tenure of employment by reason of an employee's membership in any labor organization.

In defining "supervisors", Congress had in mind supervisory personnel traditionally regarded as a part of management and to place into the employer category those who act for management in formulating and executing its labor policies. International Union of United Brewery, etc. v.

N.L.R.B., 298 F.2d 297, (D.C. Cir. 1961), cert. denied 369 U.S. 843, 7 L.Ed.2d 847, 82 S.Ct. 875 (1962). In excluding supervisors from the rights and protections afforded employees, the purpose was to assure to employers their right to select their supervisors and to procure the loyalty and efficiency of their supervisors. National Labor Rel. Bd. v. Retail Clerks Inter. Ass'n., 211 F.2d 759 (9th Cir. 1954), cert. denied 348 U.S. 839, 99 L.Ed. 662, 75 S.Ct. 47 (1954). As was said in National Labor Relations Bd. v. Edward G. Budd Mfg. Co., 169 F.2d 571, 579 (6th Cir. 1948), cert. denied 335 U.S. 908, 93 L.Ed. 441, 69 S. Ct. 411 (1949): "We believe it is clear that Congress intended by the enactment of Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities."

Erosion of this purpose appeared with the 1947 amendment (effective 23 June 1947, after the enactment and effective date of North Carolina's Right-To-Work Act), allowing supervisors to join a labor organization. Section 164(a) provides:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective-bargaining."

The question of federal preemption in the labor relations field has frequently been before the courts since the enactment of Taft-Hartley. As was said in Garner v. Teamsters Union, 346 U.S. 485, 488, 98 L.Ed. 228, 74 S.Ct. 161 (1953), "[t]he National Labor Management Relations Act

. . . leaves much to the states, though Congress has refrained from telling us how much".

"When a union attempts to organize supervisors, or when supervisors elect to become members of a union, a problem of federal preemption does arise." 4 Jenkins, Labor Law, §21.9, The Federal Preemption Doctrine, p. 103. In San Diego Unions v. Garmon, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959), Mr. Justice Frankfurter, speaking for the majority, laid down certain guidelines when he said:

> "If the Board decides, subject to appropriate federal judicial review, that conduct is protected by §7 [29 U.S.C.A. 157], or prohibited by §8 [29 U.S.C.A. 158], then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States." 359 U.S., at p. 245.

In Hanna Mining v. Marine Engineers, 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965), in an opinion by Mr. Justice Harlan, expressing the view of eight members of the Court, it was held that under the circumstances of that case, the federal act did not preempt the state's jurisdiction. Plaintiffs, employers, declined to negotiate with a union representing the marine engineers until it was established that the union represented a majority of the engineers whereupon the union picketed plaintiffs' ships. Employers petitioned that a representation election among its engineers be held. The petition was dismissed by the National Labor Relations Board on the ground that the engineers were "supervisors" under the Act, and excluded from the definition of employees. The employers' charge alleging a violation of Section 8 [29 U.S.C.A. §158] of the Act was

dismissed on the ground that the union's conduct fell outside the provisions of the Act because it sought to represent "supervisors" rather than "employees". Plaintiffs then brought suit in Wisconsin state court seeking injunctive relief. The state court dismissed for lack of jurisdiction. The Supreme Court of Wisconsin affirmed on the ground that the picketing, while illegal under Wisconsin law, arguably violated Sections 8(b)(4)(B) and 8(b)(7) of the Act [29 U.S.C.A. §158(b)(4)(B) and 29 U.S.C.A. §158(b)(7)] and so fell within the exclusive jurisdiction of the National Labor Relations Board. In reversing, the Supreme Court said:

> "The ground rules for preemption in labor law, emerging from our Garmon decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by §7, or prohibited by §8' of the National Labor Relations Act, see 359 U.S., at 244-246, and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation, cf. 359 U.S., at 245.
>
> For the reasons that follow, we believe the Board's decision that Hanna engineers are supervisors removes from this case most of the opportunities for preemption." 382 U.S., at pp. 187-188.

The Court went on to say that exclusion of supervisors from the definition of employees had the obvious result that many provisions of the Act employing that pivotal term would cease to operate where supervisors were the focus of concern. There cannot be protection by Section 157 nor do supervisors come within the prohibitions of Section 158. The defendants argued that Section 164(a)

ousted both state and federal authority and signified "a laissez faire toward supervisors". The Court said the position had no merit since "the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. Whether the legislators fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted §8(b) [29 U.S.C.A. §158(b)] is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing." 382 U.S., at pp. 189-190.

Applying what we deem to be the holding of *Hanna, i.e.*, that a state does have jurisdiction over activities of supervisors because the activities of supervisors could not be arguably either prohibited or protected under the Act, we reach the conclusion that in the case before us where, as in *Hanna,* the union members involved have been classified by the National Labor Relations Board as supervisors, the State court has jurisdiction. Plaintiffs as supervisors are not arguably either protected by Section 157 or prohibited by Section 158. While Willard v. Huffman, 250 N.C. 396, 109 S.E.2d 233 (1959), cert. denied 361 U.S. 893, 4 L.Ed.2d 150, 80 S.Ct. 195 (1959), did not deal with supervisors, we think this position is within the rationale of that holding.

We next reach the question of whether plaintiffs come within the purview of G.S. 95-83 giving the right to recover damages to any "person" whose continuation of employment has been denied because of union membership. Defendants strenuously insist that the purpose of North Carolina's Right-To-Work Statutes is the same as the Labor Management Relations Act - to protect rank-and-file employees from unfair labor practices and provide them with

the right, if they choose, to negotiate as one on an equal basis with management. They contend that to interpret the statute as including supervisors would result in the division of management into owners and supervisors, seriously weaken the position of management, and create a severe imbalance between labor and management. While we are inclined to agree, we are bound by the rules of statutory construction. "If the language of a statute is clear and unambiguous, judicial construction is not necessary. Its plain and definite meaning controls. (Citations omitted.) But if the language is ambiguous and the meaning in doubt, judicial construction is required to ascertain the legislative intent. (Citations omitted.)" Underwood v. Howland, Comr. of Motor Vehicles, 274 N.C. 473, 479, 164 S.E. 2d 2 (1968). The meaning of the word "person" certainly is clear and unambiguous and leaves no room for argument. It is defined as "an individual human being". Webster's Third New International Dictionary (1968). The term obviously includes supervisors as well as employers. We recognize the fact that this statute was enacted just a few months prior to the effective date of 29 U.S.C.A. 164(a). However, the legislature did not see fit to use the word "employee", specifically excluding supervisors from its meaning, as did the legislatures of some states in enacting right-to-work statutes. To give the plain language of the statute, by interpretation, a meaning it does not have would result in amending the statute. This is the prerogative of the legislature.

For the reasons stated herein, the judgment of the trial tribunal must be reversed. The court did not rule on defendants' motion to dismiss the prayer for relief as to punitive damages nor for misjoinder of claims. These questions, therefor, are not before us.

Reversed.

Judges VAUGHN and GRAHAM concur.

NORTH CAROLINA SUPREME COURT
Fall term, 1972

Opinion of the Supreme Court of the State of North Carolina is officially reported in 282 N.C. 530, 193 S.E.2d 911 and can be found beginning at page A.1. in the Appendix to the Petition For a Writ of Certiorari to the Supreme Court of the State of North Carolina.